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19 **UNITED STATES DISTRICT COURT**  
20 **CENTRAL DISTRICT OF CALIFORNIA**

21 IN RE: TOYOTA MOTOR CORP.  
22 UNINTENDED ACCELERATION  
23 MARKETING, SALES PRACTICES, AND  
24 PRODUCTS LIABILITY LITIGATION

25 This document relates to:

26 ALL CASES

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Case No.: 8:10ML2151 JVS (FMOx)

DISCOVERY MATTER

TOYOTA DEFENDANTS'  
**REDACTED** SUPPLEMENTAL  
RESPONSE BRIEF RE DEPOSITIONS  
OF TOYOTA ENTITIES AND THEIR  
EMPLOYEES [FRCP 30(b)(6), 30(b)(1)  
AND SPECIFICALLY NAMED  
EMPLOYEES]

Date: February 17, 2012  
Location: JAMS  
500 N. State College Blvd.  
14<sup>th</sup> Floor  
Orange, CA 92868  
  
Special Masters: Hon. John K. Trotter  
Hon. Steve J. Stone

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1     **I. INTRODUCTION**

2           Plaintiffs repeatedly stress how important the four individuals that are in dispute  
3 are and submit emails to the Special Masters from these individuals to try and show  
4 that they are knowledgeable about a number of topics of interest to Plaintiffs. But the  
5 legal decision before the Special Masters is not whether these witnesses might have  
6 relevant or even significant knowledge about topics in this case; the issue is whether  
7 their position in the company is that of a managing agent under the law.<sup>1</sup> *United*  
8 *States v. Afram Lines (USA), Ltd.*, 159 F.R.D. 408, 413 (S.D.N.Y. 1994) (holding that  
9 “a corporate employee or agent who does not qualify as an officer, director, or  
10 managing agent is not subject to deposition by notice” and thus cannot be compelled,  
11 as a foreign resident, to attend a deposition in the United States). As discussed below  
12 and in Toyota’s prior brief, these individuals are not managing agents, and this Court  
13 should respect these Japanese citizens’ rights to be deposed in the country where they  
14 live and do business.

15           Similarly, the Plaintiffs’ argument that they should be relieved from going to  
16 Japan because it is too burdensome is not supported in case law or fact. At the hearing  
17 on February 1, 2012, and in their briefing before the Court, the Plaintiffs represented  
18 that due to the procedural restrictions on scheduling depositions in Japan, it would be  
19 virtually impossible for the Plaintiffs to take these individuals unless the Special  
20 Masters ordered Toyota to produce them in California. After listening to this  
21 argument, Justice Trotter stated during the hearing that he felt as if he was being put in  
22 a Hobson’s choice – if he agreed with Toyota that these were not managing agents  
23 then the Plaintiffs would have no ability to depose these individuals.

24  
25  
26           <sup>1</sup> In some cases, the key witness may be the janitor of the company, but just because  
27 the janitor may have critical testimony that does not elevate him to a “managing  
28 agent” or provide justification for a court to bend the rules of comity and compel the  
witness to be deposed thousands of miles from his residence.

1 After the hearing, Toyota reached out to the U.S. consulate in Osaka to see  
2 whether the Parties could reserve space for the depositions prior to the June deadline  
3 insisted on by Plaintiffs. *Toyota was able to reserve an entire week in April for these*  
4 *depositions and for the deposition of Mr. Meguro* whom the Plaintiffs have agreed  
5 will be deposed in Japan because of health concerns for his wife. Toyota promptly  
6 communicated that information to Plaintiffs, and it was that communication that  
7 prompted the telephone hearing yesterday.<sup>2</sup> When Justice Stone asked Plaintiffs'  
8 counsel why they could not depose these four individuals when they were over in  
9 Japan anyway to take Mr. Meguro's deposition, it was clear from Plaintiffs' lack of  
10 response that the real issue is not that the Plaintiffs cannot take the depositions in  
11 Japan; *the real issue is they just don't want to.*<sup>3</sup> In fact, Plaintiffs stated more than  
12 once during the call that they intended to notice another 30 or so witnesses and it  
13 would be too much trouble for them and the Special Masters to have to decide  
14 whether each one was a managing agent, so they argued that the Court should not set  
15 such precedent here.

16 Even though Toyota has already bent over backwards and has agreed to bring a  
17 large number of Plaintiffs' requested witnesses to the United States for depositions,  
18 and likely will for the next batch of names,<sup>4</sup> Plaintiffs' reasoning that it is just too

19  
20 <sup>2</sup> See attached email dated February 7<sup>th</sup> from Tom Klein to Plaintiffs, attached hereto  
as Exhibit 1.

21 <sup>3</sup> Attempting to persuade the Special Masters to compel these four individuals to the  
22 United States, the Plaintiffs stated during the February 1st hearing that these  
23 depositions would likely be very short (a couple of hours) and would not require the  
24 witnesses to be in the United States very long. After Toyota told the Plaintiffs that it  
25 was able to make reservations at the Osaka Consulate for a whole week for these four  
26 witnesses and Mr. Meguro, Plaintiffs balked during the call last night, stating that they  
27 might need several days with each witness. Although, it is difficult for Toyota to  
28 respond to all the shifting positions that Plaintiffs seem to put forth, even if Plaintiffs  
truly needed more time with some of these witnesses, then the Parties can contact the  
Consulate to seek to get more time. At a minimum, at least some if not all of the  
depositions can proceed forward on that week in April. The default response is not to  
just immediately conclude that the depositions must be moved to the United States.

<sup>4</sup> Of course, Toyota cannot make specific representations as Plaintiffs have not even

1 cumbersome to require them to establish that all of these individuals are managing  
2 agents, if accepted, would completely eviscerate the Federal Rule's limitations that  
3 explicitly require that each individual be assessed separately. Indeed, it is precisely  
4 because the circumstances are different for some of the names on Plaintiffs' wish list  
5 than on others that Toyota is before this Court with respect to these four individuals.

6 **II. THE BURDEN IS ON THE PLAINTIFFS TO ESTABLISH THAT**  
7 **EACH INDIVIDUAL IS A MANAGING AGENT**

8 Toyota will not repeat all the case law it has previously provided the Special  
9 Masters but does want to point out that the Plaintiffs repeatedly conflate terms during  
10 the oral arguments in an effort to try and get the Special Masters to reverse the order  
11 of proof in this matter. Using stock phrases such as "tie goes to the plaintiffs", the  
12 Plaintiffs ignore the fact that they have to initially provide sufficient proof that, if left  
13 un rebutted, would persuade the Court that each of these individuals qualifies  
14 separately as a managing agent under the law. Simply put, the party seeking the  
15 discovery, in this case Plaintiffs, has the initial burden of establishing that the  
16 proposed deponent is a managing agent of the corporate party. *Afram Lines*, 159  
17 F.R.D. at 413 ("[T]he burden is on the discovering party to establish the status of the  
18 witness . . . . [T]he examining party has the burden of providing enough evidence to  
19 show that it is at least a close question whether the proposed deponent is a managing  
20 agent."); *see also Murata Mfg. Co., Ltd. v. Bel Fuse, Inc.*, 242 F.R.D. 470, 476 (N. D. Ill.  
21 2007); *In re Honda American Motor Co.*, 168 F.R.D. at 540; *Sugarhill Records Ltd. v.*  
22 *Motown Record Corp.*, 105 F.R.D. 166, 170 (S.D.N.Y. 1985); *Proseus v. Anchor*  
23 *Line, Ltd.*, 26 F.R.D. 165, 167 (S.D.N.Y. 1960). Only in the event that Plaintiffs meet

24  
25 sent us the list of names and we do not know who Plaintiffs are seeking to notice for  
26 these additional depositions or what their position with the Company is. However,  
27 Toyota has repeatedly worked in good faith to compromise and has already  
28 voluntarily offered to make Mitchihito Shimada, Shinji Miyamoto, Motoki Shibata,  
Hirohisa Kishi, Takashi Ogawa, Masaaki Murata, Tsutomu Miyazaki and Hiroshi  
Miyata available for depositions in the United States.

1 their initial burden as to each witness's status do the Special Masters need to consider  
2 whether this is a "close case" or whether existing doubt should be resolved in favor of  
3 the Plaintiffs. *See Afram Lines*, 159 F.R.D. at 413; *Sugarhill*, 105 F.R.D. at 171.  
4 Consequently, the Special Masters should not automatically presume that these  
5 witnesses are managing agents based merely upon Plaintiffs' bare assertions and,  
6 instead, should first require that Plaintiffs meet their burden of proof.

7 **III. PLAINTIFFS HAVE NOT COME CLOSE TO ESTABLISHING THAT**  
8 **THESE FOUR JAPANESE CITIZENS ARE MANAGING AGENTS**  
9 **AND THE EVIDENCE PROVES THAT THEY ARE NOT**

10 Plaintiffs offer two arguments as to why these four individuals are Managing  
11 Agents. Neither is sufficient. The first is that some (but not all) have the title  
12 "manager". As Justice Stone stated during the February 1, 2012 Hearing, the  
13 resolution of whether an individual should be treated as a managing agent is not  
14 dependent on their title, but their function and position in the company. *Hynix*  
15 *Semiconductor Inc. v. Rambus Inc.*, CV-00-20905 RMW, 2008 WL 350643 (N.D.  
16 Cal. Feb. 2, 2008) ("Courts have interpreted 'managing agent' flexibly, emphasizing  
17 'what the employee actually did, rather than what title or position she held.' " (citing  
18 *Young & Associates Public Relations, L.L.C. v. Delta Air Lines, Inc.*, 216 F.R.D. 521,  
19 523-24 (D. Utah 2003)). The specifics of the particular company and culture must be  
20 examined in order to assess what duties attach to a particular title as titles can be used  
21 quite differently in different organizations, particularly ones in a foreign country. An  
22 individual can have the title of "manager," or even "agent," and still not be deemed a  
23 "managing agent".<sup>5</sup> *See Finley v. Count of Martin*, No. C-07-5922 EMC, 2009 WL  
24 3320263, at \*2 (N.D. Cal. Oct. 13, 2009) (plaintiff failed to meet burden where "the  
25 fact that Ms. Grant has the word 'manager' in her title is not enough to establish that

26  
27 <sup>5</sup> Several organizations even bestow upon trainees the title of "manager" or "assistant  
28 manager". The law was not intending to elevate such people even with that title to the  
seniority required to be compelled to attend a deposition wherever noticed.

1 she is a managing agent”); *Afram Lines*, 159 F.R.D. at 415 (“counsel draw an apt  
2 analogy: travel agents often have broad responsibilities to arrange a client’s  
3 transportation, accommodations, entertainment, and even meals, yet it is doubtful that  
4 they would be accorded sufficient discretion to be considered the client’s managing  
5 agent.”) The concept of managing agent under federal law is designed to capture  
6 people of similar level as senior officers and directors who have high degrees of  
7 authority such that it would be acceptable to require them to defend the company in a  
8 deposition some place other than their residence. These four individuals do not have  
9 that seniority or decision making ability.

10 The second “proof” that the Plaintiffs submit is a series of emails to and from  
11 these individuals coupled with Plaintiffs speculations as to what these emails mean  
12 and what inferences the Special Masters must draw. Plaintiffs misconstrue the context  
13 of these emails.

14 **A. Hisako Jitsumori**

15 As set forth in Toyota’s Response Brief, Ms. Hisako Jitsumori is a staff member  
16 in TMC’s North America CS Group, North & Latin America Field Operations  
17 Department, Overseas Service Field Operations Division (“OSFOD”) who has never  
18 held any managerial positions or responsibilities at TMC and who has never  
19 supervised any TMC employees. (*See* Declaration of Hisako Jitsumori (“Jitsumori  
20 Decl.”), Docket #2188-1, at ¶¶ 1, 10, 11.) Her position is largely ministerial in nature:  
21 she facilitates communication between her particular TMC division and certain  
22 distributors and Toyota Motor Sales (“TMS”). (*See id.* at ¶ 7.) Ms. Jitsumori’s duties  
23 do not provide any general corporate authority, discretion, or power to act on TMC’s  
24 behalf or to make decisions regarding matters pertinent to the operation and  
25 management of TMC. (*See id.* at ¶ 11). Such decisions are the responsibility of her  
26 superiors. (*See id.* at ¶ 9).

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[REDACTED]

1 [REDACTED]  
2 [REDACTED]  
3 [REDACTED]  
4 Each of the documents identified by Plaintiffs in support of their request to  
5 compel the deposition of Ms. Jitsumori in the U.S. do not in any way support a  
6 determination that she is a “managing agent.” [REDACTED]  
7 [REDACTED]

8 [REDACTED] Courts routinely find employees are not managing  
9 agents where, as here, the employee has no managerial responsibilities or decision-  
10 making authority, but instead merely facilitates transactions between divisions of the  
11 company. *See Felman Prod., Inc. v. Indus Risk Insurers*, No. 3:09-cv-00481, 2010  
12 WL 5110076, at \*7 (S.D. W.Va. Dec. 9, 2010) (examining party failed to  
13 demonstrate witness was managing agent where communications showed witness  
14 “acting as an intermediary between” company representatives and counsel and  
15 concluding he “served as an interpreter/translator, not a decision-maker”); *Libbey*  
16 *Glass*, 197 F.R.D. at 351 (individual who “may well have played an important role”  
17 in events giving rise to lawsuit was not managing agent because he “acted as a  
18 liaison” and “facilitated, but did not control” those events)); *Gen’l Tire Inc. v. Broad*  
19 *Elm Auto Ctrs. of Niagara Falls, Inc.*, No. 94-CV-960A, 1997 WL 929823, at \*3  
20 (W.D.N.Y. Apr. 18, 1997) (defendant failed to show field sales representatives were  
21 managing agents where they acted as a “conduit for communications between [the  
22 plaintiff] and its dealers, i.e. to provide training and information to the dealers about  
23 ... products and promotions and to provide [the plaintiff] with feedback concerning its  
24

25 [REDACTED]  
26 [REDACTED]  
27 [REDACTED]  
28

1 dealers and products” and had no other authority to negotiate or bind the company);  
2 *see also Philadelphia Indem. Ins. Co. v. Federal Ins. Co.*, 215 F.R.D. 492, 494 (E.D.  
3 Pa. 2003) (holding that witness’s correspondence did not demonstrate authority to act  
4 and make decisions on employer’s behalf, only that she was a contact person and thus  
5 not a managing agent).

6 **B. Makoto Kimijima**

7 Like Ms. Jitsumori, Mr. Kimijima does not hold any managerial positions or  
8 responsibilities at TMC, serves in a “staff” role, and does not supervise any TMC  
9 employees. (*See* Declaration of Makoto Kimijima (“Kimijima Decl.”), Docket #2188-  
10 2, at ¶ 4, 5, 8.) Though his title is “Project Manager,” the position does not provide  
11 any general corporate authority, discretion, or power to act on TMC’s behalf or to  
12 make decisions regarding matters pertinent to the operation and management of TMC.  
13 (*See* Kimijima Decl. at ¶ 8). He reports to a Group Manager, who in turn reports to a  
14 Project General Manager. (*Id.* at ¶ 4).

15 [REDACTED]  
16 [REDACTED]  
17 [REDACTED]  
18 [REDACTED]  
19 [REDACTED]  
20 [REDACTED]  
21 [REDACTED]  
22 [REDACTED]  
23 [REDACTED]  
24 [REDACTED]  
25 [REDACTED]

26 [REDACTED]  
27 [REDACTED]  
28 [REDACTED]

1 [REDACTED]  
2 [REDACTED] Plaintiffs have again not met their burden that Mr. Kimijima is a  
3 managing agent for the purposes of compelling his deposition in the U.S.

4 **C. Koji Sakakibara**

5 It is uncontroverted that Mr. Sakakibara is not presently a managing agent  
6 within TMC. To the contrary, Mr. Sakakibara is currently employed as a manager in  
7 Body Design Group, Vehicle Design Department, Research and Development Center  
8 for Toyota Motor Kyushu, Inc. (See Declaration of Koji Sakakibara ("Sakakibara  
9 Decl."), Docket #2188-6, at ¶ 1.) Plaintiffs do not contend that this position is  
10 sufficiently senior that they should be allowed to force him to travel to the U.S. for a  
11 deposition. [REDACTED]

12 [REDACTED]  
13 [REDACTED] During that time, he was responsible for receiving and distributing reports  
14 containing field information from Toyota Motor Sales, U.S.A, Inc. to engineering  
15 divisions at TMC. (Sakakibara Decl. at ¶ 10) However, Mr. Sakakibara did not have  
16 any general corporate discretion, authority, or power to act on TMC's behalf during  
17 that time, as decisions regarding issues pertinent to the CQE Division were generally  
18 reviewed by the General Managers of various departments within that division, and  
19 not Mr. Sakakibara. (Id.) Thus, he is not a managing agent for the purposes of this  
20 litigation currently, and he was not a managing agent during the period cited by  
21 Plaintiffs.

22 [REDACTED]  
23 [REDACTED]  
24 [REDACTED]  
25 [REDACTED]  
26 [REDACTED]  
27 [REDACTED]



Thus, while Toyota would contend that Plaintiffs have not established that Mr. Sakakibara would be classified as a managing agent in his old position, that issue is not really before the Special Masters. *See Hynix Semiconductor Inc. v. Rambus Inc.*, CV-00-20905 RMW, 2008 WL 350643, at \*2 (N.D. Cal. Feb. 2, 2008) (“point in time for determining whether a deponent falls within the “managing agent” exception is the time of the deposition.”); *In re Honda American Motor Co., Inc. Dealership Relations Litigation*, 168 F.R.D. 535, 542 (1996) 168 F.R.D. at 542 (finding that former company president was not a managing agent at the time of the proposed deposition and thus could not be compelled to attend the noticed deposition in the U.S.). At this time, there is nothing to suggest that he is a managing agent for TMC.

**D. Kazutoshi Kunishima**

As an initial matter, Plaintiffs submission of their translations of several Japanese documents last night does not provide Toyota time to review their accuracy. Notwithstanding this fact, Plaintiffs have nonetheless failed to establish that Mr.

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<sup>10</sup> In fact, one of Mr. Sakakibara’s supervisors during this period, Vice President Mr. Keiichi Fukushima, has been specifically noticed for deposition by Plaintiffs. (*See Sakakibara Decl.* at ¶ 11.) Plaintiffs have other options to explore the issues they seek without forcing Mr. Sakakibara to travel to the U.S.

1 Kunishima is a managing agent that may be compelled to attend his deposition in the  
2 U.S. Even a cursory reading of these materials shows that the comments attributed to  
3 Mr. Kunishima by Plaintiffs at the hearing are not his comments.

4 [REDACTED]  
5 [REDACTED]  
6 [REDACTED]  
7 [REDACTED]  
8 [REDACTED]  
9 [REDACTED]  
10 [REDACTED]  
11 [REDACTED]  
12 [REDACTED]  
13 Plaintiffs have offered no proof to  
14 establish that Mr. Kunishima's present responsibilities are in any way related to this  
15 litigation.

16 [REDACTED]  
17 [REDACTED]  
18 [REDACTED]  
19 Thus, he  
20 should not be compelled to attend a deposition in the U.S. *See Hynix Semiconductor*  
21 *Inc. v. Rambus Inc.*, CV-00-20905 RMW, 2008 WL 350643, at \*2; *In re Honda*  
22 *American Motor Co.*, 168 F.R.D. at 542.

23 As shown above, these submitted documents do not provide sufficient basis for  
24 anyone to conclude that these individuals should be considered as a "managing agent"  
25 under the case law previously discussed.

26 [REDACTED]  
27 The issue before the Court is not the knowledge of a witness on a  
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1 particular topic, or even the authority of the individual in a specific area, but the  
2 function of that person within the entire organization. For example an associate in a  
3 law firm is often very knowledgeable about specific issues in a case or an argument  
4 and can send emails to the partner about what arguments the partner should make, but  
5 that doesn't make the associate a partner. Indeed, every person in a company is king  
6 of a certain domain but that does not make them king of the company or managing  
7 agents.

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13 This is not a close case. There is no need for instant replay, tie goes to the  
14 runner, or any other sports euphemism that the Plaintiffs wish to toss out. The  
15 Plaintiffs have clearly not presented evidence beyond mere speculation and their  
16 conjecture that any of these people rise to the level to be classified as a managing  
17 agent, particularly in face of the clear statements to the contrary by the individuals  
18 themselves. This is simply not the situation where the Court should allow the  
19 Plaintiffs to force these people to be deposed in the U.S. just so the Plaintiffs can see  
20 if they can prove they are managing agents once they get here.

21 **IV. CONCLUSION**

22 Plaintiffs chose to sue a Japanese based company when they joined TMC in this  
23 action. TMC did not initiate this lawsuit or choose this forum. From the inception of  
24 this case Plaintiffs have claimed that they have the skill set and ability to pursue TMC  
25 and take all the depositions in Japan that they claim to need. Now, even though  
26 Toyota has repeatedly compromised on the vast number of TMC deponents and has  
27 not insisted that they all be done in Japan, Plaintiffs do an about face, ignore efforts of  
28

1 comity, and seek to compel Toyota to produce any individual that Plaintiffs notice in  
2 the United States. With all due respect, the small burden on Plaintiffs to spend a few  
3 more days in a hotel in Japan is nothing compared to the impact of trampling on the  
4 rights of these citizens of Japan and the burden, inconvenience and expense of forcing  
5 these people to travel across the world to be deposed in California. There is no real  
6 dispute that these depositions cannot occur in Japan and Toyota has offered solutions  
7 to the Plaintiffs' counsel to try to accommodate their apparent inability to locate  
8 consulate space for these depositions that complies with Japanese law.<sup>11</sup> For all these  
9 reasons, and based on the authority and arguments previously provided to the Special  
10 Masters, Toyota respectfully requests that the Court deny Plaintiffs' motion to compel  
11 the depositions of these four individuals in the United States.

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24 <sup>11</sup> Plaintiffs spent a lot of time citing the time differential between California and  
25 Japan. If the time differential was a critical factor in deciding whether an individual  
26 should be hauled to California for a deposition then none of the cases would have ever  
27 allowed depositions in Japan, Europe or even on the East Coast of the United States.  
28 Federal courts routinely respect the comity of foreign jurisdictions and order  
depositions in other parts of the globe and deal with any issues that the time  
differences may cause. Similarly, the Parties can deal with any issues that the time  
differential may cause in this case.

1 Dated: February 9, 2012

2 By: \_\_\_\_\_/s/\_\_\_\_\_  
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